BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

REBOUND,	)	
	)	**SHB NO. 95-22**
Appellant,	)	
	)	
v.	)	**ORDER GRANTING**
	)	**PARTIAL SUMMARY JUDGMENT**
PACIFICORP, d/b/a PACIFIC POWER and LEWIS COUNTY,	)	
	)	
Respondents.	)	
	)	

Respondent, Pacific Power, moves for partial summary judgment that the appellant, Rebound, has not exhausted its administrative remedies with respect to its challenge of the threshold determination made by Lewis County under the State Environmental Policy Act (SEPA), ch. 43.21C RCW. We agree that available administrative remedies were not pursued. The SEPA challenge is accordingly waived, and summary judgment is granted on this issue.

I

The motion was made by respondent at the outset of trial on October 11, 1995. Respondent submitted a motion brief at that time. Oral argument was also heard at that time. The additional period of 7 days was granted to appellant to submit a motion brief. The same was timely filed. Having considered the briefs together with the record herein, and being fully advised, the following conclusions are hereby entered.

II

There are no genuine issues of material fact concerning this motion.

III

On December 2, 1994, Pacific Power filed an application with Lewis County for a shoreline substantial development permit to construct a railroad siding near its Centralia Steam Plant.

IV

On December 19, 1994, based on information contained in the checklist and other information, Lewis County issued a Mitigated Determination of Non-Significance (MDNS) for the proposal. An MDNS is a SEPA threshold determination.

V

An extended public comment period was provided in the MDNS. That ended on January 16, 1995. The minimum comment period of 15 days would have ended on January 3, 1995.

VI

Notice of the MDNS was published in the Morton Journal on December 21 and 28, 1995, and on the same dates also in The Chronicle.

VII

No comments were received during the comment period, either from Rebound or others.

VIII

Lewis County Ordinance No. 1080-A provides for an administrative appeals process for threshold determinations. Both the MDNS and the published notice of the MDNS specifically described that appeal process, and the requirement that an appeal be filed before the Board of Commissioners of Lewis County, within 7 days of the end of the extended comment period.

IX

No appeal of the MDNS was filed with the Board of Commissioners of Lewis County, either by Rebound or others.

X

Lewis County granted the shoreline substantial development permit to Pacific Power on March 24, 1995.

XI

Rebound is aggrieved by the granting of the permit and now petitions for review here, challenging both the SEPA threshold determination and the permit issuance.

XII

An appeal from a county SEPA determination to another office within the county (such as the County Commissioners) is authorized by SEPA:

> *Agencies may provide for an administrative appeal of determinations relating to SEPA in their agency SEPA procedures...*WAC 197-11-680 (3) (a), see also RCW 43.21C.075 (3).

The term "agency" includes local governments such as counties. WAC 197-11-714. Lewis County is therefore authorized to adopt SEPA procedures which provide an internal, administrative appeal. Lewis County has done so.

XIII

Within SEPA's appeal provisions it states:

> *If a person aggrieved by an agency action has the right to judicial appeal, and if an agency has an appeal procedure, such person shall, prior to seeking any judicial review ,use such procedure if such procedure is available, unless expressly provided by state statute.* RCW 43.21C.075 (4).

This is a requirement for exhaustion of administrative remedies. We conclude that it applies to this case.

XIV

The statutory reference in RCW 43.21C.075 (4), above, is to exhaustion of an "agency" (county) appeal prior to "judicial" review. The use of the term "judicial", however, should not vary the principle involved where, in the specific area of shoreline appeals, appeal lies to this State Board from county action, as opposed to the more common review of county action by writ of review in a judicial forum. The function of this Board is, like a judicial forum, one of review over the SEPA actions taken below. Both the judicial branch and quasi-judicial boards are exempted, themselves, from SEPA compliance because of this review role. Both judicial and quasi-judicial bodies are granted this SEPA categorical exemption under the heading of "Judicial Activity". WAC 197-11-800 (12).

XV

Generally, a SEPA appeal should be linked to an appeal of the underlying permit. See RCW 43.21C. 075 (1). A specific, statutory exception to this general rule is set forth at RCW 43.21C.075 (3) (a):

> *The appeal proceeding on a determination of significance / nonsignificance may occur before the agency's final decision on a proposed action.*

XVI

The purpose of an early appeal on an MDNS is to apprise the county of any impropriety while the county is still in a position to correct that impropriety before taking action on the permit. This was among the factors enumerated by the Supreme Court in Citizens for Clean Air v. Spokane, 114 W. 2d 20, 785 P.2d 447 (1990):

> *We explained the policies underlying exhaustion in Orion Corp. v. State, 103 Wn.2d 441, 456, 693 P.2d 1369 (1985) and reiterated them in Friedman, 112 Wn.2d at 78. The exhaustion requirement 1) prevents premature interruption of the administrative process; 2) allows the agency to develop the factual background on which to base a decision; 3) allows the exercise of agency expertise; 4) provides a more efficient process and allows the agency to correct its own mistake; and 5) insures that individuals are not encouraged to ignore administrative procedures by resort to the courts.*

Appellant, Rebound, has failed to exhaust its administrative remedy, and is barred by RCW 43.21C.075(4) from challenging Lewis County's MDNS in this review. Summary judgment should be granted for respondents on this issue. Accord Clifford v. City of Renton and The Boeing Co., SHB No. 92-52 and 92-53, Order Granting and Denying Summary Judgment, (1993).

XVII

Appellant, Rebound, seeks to avoid summary judgment by raising certain defenses which we now consider and reject.

XVIII

Appellant first argues that failure to exhaust administrative SEPA remedies was not reserved as an issue in the Pre-Hearing Order in this matter. This is significant, as the issues in a pre-hearing order control the proceedings "unless modified for good cause by subsequent order". WAC 461-08-140. Upon consideration, we conclude that good cause has been shown to add this issue for two reasons. First, a contrary disposition would encourage disregard for county administrative procedures in contravention of public policy. Second, the issue was raised by motion at the outset of trial, there are no genuine issues of material fact, and appellant, as the non-moving party, was granted additional time in which to brief the legal issue. Appellant has not been prejudiced in preparing a response to this issue. Accordingly, the respondent has shown good cause to add the exhaustion issue, and the Pre-Hearing Order should be so amended.

XIX

Appellant cites our decision in Eldridge v. Stanwood, SHB No. 91-62, Decision and Order Denying Motion for Partial Summary Judgment, (1992). That decision is contrary to Clifford, *supra*, which was decided a year later. Eldridge reached its conclusion without discussion of RCW 43.21C. 075 (4) requiring exhaustion of administrative remedies or RCW 43.21C.075 (3) (a) allowing administrative appeal of threshold determinations prior to final permit action. It is unclear whether these sections were briefed to the Board in Eldridge. To the extent that Eldridge is inconsistent with Clifford or our decision herein, Eldridge is overruled.

XX

Appellant next cites an amendment to SEPA made in 1994 and providing as follows:

> *In the case of an appeal under this chapter (SEPA) regarding a project or other matter that is also the subject of an appeal to the shorelines hearings board under chapter 90.58 RCW, the shorelines hearings board shall have sole jurisdiction over both the appeal under this section and the appeal under chapter 90.58 RCW, shall consider them together, and shall issue a final order.*

RCW 43.21C.075(7), as amended by Laws, 1994, ch. 253, Sec. 4.

Prior to this amendment, where a project required a shoreline permit reviewable here and at least one other permit reviewable in superior court, the jurisdiction for SEPA review went jointly here and to court, with uncertain rules of comity determining where the issue would be resolved. See also RCW 43.21C.080 (2) (a), second proviso, which had the effect in certain cases of barring SEPA review here when a non-shoreline permit was granted prior to a shoreline permit. The SEPA amendment settled this area by granting exclusive "jurisdiction" to review SEPA here, rather than in superior court when a shoreline permit is involved. That jurisdiction, however, is not at issue here. Rather, the appellant's failure to exhaust administrative remedies now prevents it, under RCW 43.21C.075 (4), from invoking that jurisdiction. The same would have been true had the matter gone to superior court before the above amendment. The amendment, which relates to jurisdiction, does not change the obligation to exhaust administrative remedies, nor change the result in this case.

XXI

Lastly, appellant contends that the county conditioned its MDNS on the issuance of a shoreline permit. From this it argues that it could not evaluate the MDNS until the permit action. We are not persuaded by this contention. Appellant's obligation under the Lewis County

Ordinance was to appeal the MDNS. That is both where and when an inability to evaluate should have been raised.

WHEREFORE IT IS ORDERED:

1. The Pre-Hearing Order is amended to include the issue, presented by this motion, of exhaustion of administrative remedies with respect to SEPA.

2. Respondent's Motion for Summary Judgment is granted.

DONE at Lacey, Washington, this 11th day of January, 1996.

SHORELINES HEARINGS BOARD

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